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No. 91-

In the Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

SANDRA FAUCHER, ET AL., RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 19, 1991

QUESTIONS PRESENTED

Whether this Court's opinion in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), deprives the Federal Election Commission of authority to promulgate a regulation implementing Congress's expressed intention that 2 U.S.C. § 441b require corporations and unions to finance the public dissemination of voter guides indicating support for, or opposition to, the positions of clearly identified federal candidates from separate segregated funds rather than from corporate or union treasuries.

STATEMENT NAMING ADDITIONAL PARTY

The only named party to this case not reflected in the caption is respondent Maine Right to Life Committee, Inc.

Richard Thornburgh in his official capacity as Attorney General of the United States was originally named a defendant and filed a motion to dismiss, but did not participate in the proceedings before the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

The Federal Election Commission ("the Commission" or "FEC") respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit in *Sandra Faucher, et al. v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991).

OPINIONS BELOW

The March 21, 1991, decision and judgment of a panel of the court of appeals affirming the district court's judgment is published at 928 F.2d 468 (1st

Cir. 1991), and appears at Appendix ("App.") A. The June 29, 1990, findings of fact and conclusions of law of the United States District Court for the District of Maine and the July 2, 1990, final judgment of that court declaring 11 C.F.R. § 114.4(b)(5)(i) invalid are published at 743 F. Supp. 64 (D.Me. 1990) and appear at App. B.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1991. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This case concerns provisions of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. §§ 431-455,[1] specifically 2 U.S.C. § 441b, and a regulation implementing that section, 11 C.F.R. § 114.4(b)(5)(i). For the Court's convenience, 2 U.S.C. § 441b is set forth in its entirety at App. C and 11 C.F.R. § 114.4(b)(5)(i) is set forth at App. D.

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[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1509, 1565; by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3335, 3357; by Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 662, 663 (1988); by Pub. L. No. 101-194, Title VI, Sec. 601(b)(1), 103 Stat. 1762 (1989); and by Pub. L. No. 101-280, Sec. 7(b)(1), 104 Stat. 161 (1990).

STATEMENT OF THE CASE

A. The Act

The Commission is the independent agency established by Congress to administer the Act, the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. Congress granted the Commission exclusive jurisdiction over civil enforcement of these three statutes, which together create a comprehensive regime regulating the financing of federal election campaigns, including contribution and expenditure limitations, disclosure requirements, and public funding of presidential campaigns. Congress specifically authorized the Commission to "formulate policy with respect to [the Act]," 2 U.S.C. § 437c(b)(1), and to make "such rules . . . as are necessary to carry out the provisions" of the statutes it administers, 2 U.S.C. §§ 437d(a)(8), 438(a)(8).

The Act contains a special scheme, originally enacted as an independent statute before the rest of the Act was devised, for the regulation of election contributions and expenditures by corporations and labor organizations. This special scheme, now codified at 2 U.S.C. § 441b, prohibits corporations and unions from using their general treasury funds to make any "contribution or expenditure in connection with any [federal] election." In 1971 Congress adopted an amendment to this provision, now codified at 2 U.S.C. § 441b(b)(2)(C), that expressly allows corporations and unions to use their treasury funds to establish, administer, and solicit funds to "separate segregated fund[s] to be utilized for political purposes." A separate segregated fund consists of donations voluntarily

made by a restricted class of corporate employees and stockholders or members and the families of those individuals. A corporation may contribute no treasury monies to the fund, and the fund must be kept in an account separate from corporate treasury money. However, the corporation can exercise complete control over its separate segregated fund, including all decisions regarding the making of federal election contributions and expenditures from it. *FEC v. National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982).[2]

Although partisan communications to the general public must be financed from a separate segregated fund, the Commission's regulations permit the use of corporate and union treasury money to finance certain nonpartisan communications to the public in connection with federal elections. 11 C.F.R. § 114.4. The regulation at issue in this case permits such treasury funds to be used to "prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions." 11 C.F.R. § 114.4(b)(5)(i). That regulation lists six factors that the Commission considers in determining whether a voter guide is nonpartisan, including whether a question is worded in a way that supports the position of a candidate on the issue covered and whether an editorial position

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[2] Because the statutory definition of "political committee" includes separate segregated funds, 2 U.S.C. § 431(4)(B), they are governed by the same reporting, disclosure, and other requirements applicable to other political committees, *see, e.g.*, 2 U.S.C. §§ 432-434 and 441a, and can make unlimited independent expenditures communicating to the general public the corporation's views on candidates for federal office. *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976).

on the survey questions, or an expression of support for or opposition to any candidate, is included in the voter guide. 11 C.F.R. § 114.4(b)(5)(i)(A)-(F). These factors were derived in part from factors articulated by the Internal Revenue Service in Revenue Rulings 78-248 and 80-282. *Explanation and Justification*, 48 Fed. Reg. 50502 (1983).

B. Prior Proceedings

Respondent Maine Right to Life Committee, Inc. ("MRLC") is a nonprofit membership corporation incorporated in the State of Maine in 1974 to oppose abortion rights (App. 13a, 38a). Respondent Sandra Faucher is an MRLC corporate director (App. 13a). Since 1981, MRLC has operated a separate segregated fund, the "Maine Right to Life Political Action Committee" ("MRLCPAC"), which makes contributions to candidates (App. 14a, 38a).

MRLC uses corporate treasury funds to publish a bimonthly newsletter, the costs of which are partially defrayed by paid advertising from "pro-life" businesses (App. 14a, 39a). Of the approximately 10,000 copies printed of each issue, MRLC distributes about 5,300 copies free to the general public (App. 14a, 49a). Prior to elections in 1984, 1986, and 1988, MRLC included in its newsletter voter guides to federal and state candidates (App. 14a, 38a).

In 1989, MRLC requested an advisory opinion from the Commission under 2 U.S.C. § 437f.[3] MRLC stated

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[3] In 1985, MRLC and Faucher had brought a similar declaratory judgment action against the FEC. On February 24, 1989, the district court dismissed that action for lack of ripeness, in part because MRLC and Faucher had not requested an advisory opinion from the Commission as to whether their planned activities were prohibited. *Faucher v. FEC*, 708 F. Supp. 9 (D. Me. 1989).

that it wished to continue printing and distributing to the public pre-election editions of its newsletter containing voter guides similar to those that it had produced in prior years. The costs would again be paid from MRLC's general treasury funds, not from MRLCPAC funds. MRLC asked whether the Act and Commission regulations would permit the proposed activity (App. 13a, 41a).

In the Commission's response, Advisory Opinion 1989-28, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5978 (February 14, 1990), it concluded, *inter alia*, that although corporate expenditures for a guide like MRLC's 1984 voter guide would not be prohibited, expenditures for a guide like MRLC's 1988 general election voter guide would be prohibited. Because the 1988 guide stated the corporation's support for the positions of certain clearly identified candidates, the Commission concluded that distribution to the public of a voter guide containing partisan election messages similar to those in MRLC's 1988 voter guide could not lawfully be financed with corporate funds (App. 48a).

In April 1990, MRLC and Faucher filed their complaint in this case. They alleged that they intended to publish in the May 1990 edition of their newsletter a voter guide that would be substantially similar to the one published in their November 1988 issue. They asserted that the wording of the questions presented to the candidates might favor a particular response, that the voter guide might include editorial positions on the issues presented to the candidates, and that the guide might indicate support for or opposition to the position of particular candidates on "pro-life" issues included in the candidate survey. (App. 15a, 23a.) The primary relief sought was a judicial dec-

laration that 11 C.F.R. § 114.4(b)(5)(i) was invalid as inconsistent with the construction of 2 U.S.C. § 441b stated in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). (App. 3a-4a, 15a-16a.)

C. The District Court's Decision

The district court concluded that it had jurisdiction under 28 U.S.C. § 1331 to review the Commission's regulation (App. 16a-17a). The court found that 2 U.S.C. § 441b(a) "on its face" prohibits a corporation like MRLC from expending its treasury funds to publish voter guides of the sort it proposed (App. 18a), but concluded that it was bound by this Court's construction of section 441b in *Massachusetts Citizens for Life*, which narrowed the provision's broad wording to apply only to expenditures for communications that "expressly advocate" the election or defeat of a "clearly identified candidate" (App. 18a). The regulation of voter guide expenditures in 11 C.F.R. § 114.4(b)(5)(i) would, in the court's opinion, restrict corporate financing of some communications that do not contain "express advocacy" (App. 20a). Accordingly, the court declared the regulation "invalid as not authorized" by 2 U.S.C. § 441b as interpreted in *Massachusetts Citizens for Life* "to the extent that the regulation makes the permissibility of voter guides published by corporations hinge upon whether such guides are 'nonpartisan' in a broad sense that includes issue advocacy rather than the narrower test of 'express advocacy'" (App. 28a).[4]

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[4] MRLC and Faucher did not appeal the district court's refusal, on the ground of lack of ripeness, to grant them declaratory and injunctive relief with respect to MRLC's proposed 1990 publication (App. 22a-26a). Nor did they appeal

D. The Court of Appeals's Decision

Like the district court, the court of appeals acknowledged that "[o]n its face, the statute appears to allow for a very broad application" (App. 6a). It stated that, nonetheless, section 441b's prohibition was limited to expenditures for "express advocacy" (App. 6a). The court did not analyze either the language or the legislative history, nor did it consider whether such a construction furthered the statute's purposes. Instead, it simply found *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Massachusetts Citizens for Life* to be controlling (App. 6a-7a).

The court then found that 11 C.F.R. § 114.4(b)(5)(i) did not come within the statute as thus narrowed, interpreting the regulation as restricting "issue advocacy" as well as "express advocacy" (App. 8a, 9a). Concluding that *Massachusetts Citizens for Life* had reaffirmed that application of the Act was limited to "express advocacy" in order to safeguard "issue advocacy," the court upheld the district court's judgment that the Commission's regulation was invalid as unauthorized by 2 U.S.C. §441b.

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the court's findings (App. 20a-22a) that they lacked standing to challenge 11 C.F.R. § 114.4(b)(5)(i) on other grounds and also lacked standing to challenge the constitutionality of 11 C.F.R. § 114.4(b)(5)(ii), a voter guide regulation inapplicable to MRLC.

REASONS FOR GRANTING THE WRIT

In 2 U.S.C. § 441b, Congress required corporations and unions to finance their expenditures "in connection with" federal elections from a separate segregated fund made up of voluntary contributions given by their constituents for political purposes. This Court has repeatedly found that this limitation serves the vital national interest in protecting federal election campaigns from "the corrosive influence of concentrated corporate wealth" that would otherwise threaten "the integrity of the marketplace of political ideas." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986). "Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace" and "§ 441b seeks to prevent this threat to the political marketplace" because a separate segregated fund, "as opposed to the corporate treasury, in fact reflect[s] popular support for the political positions of the committee." *Id.* at 257-258. *See also Austin v. Michigan State Chamber of Commerce*, 110 S. Ct. 1391, 1397-1398 (1990). This Court has found that Congress's "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' . . . to account for the particular legal and economic attributes of corporations and labor organizations, warrants considerable deference." *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937)). *See also* p. 13, n.6, *infra.*

In *Massachusetts Citizens for Life*, 479 U.S. at 249, this Court stated in dictum—without any refer-

ence to the language, structure, legislative history, or purposes of the provision—that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." The court below—again without reference to the statute's language, structure, legislative history or purposes—has now relied upon that statement to hold that the Commission lacks power under the Act to adopt a regulation permitting corporate and union treasury funds to be used to distribute to the public a comparison of the positions of clearly identified candidates in an upcoming election only if it is done in a nonpartisan way that is not crafted to express the corporation's support for, or opposition to, one of the competing candidates.

The court of appeals's decision, if allowed to stand, would significantly weaken the regulation of corporate and union intervention in federal elections that Congress has long found necessary to protect the integrity of the electoral process. It would enable corporations and unions, for the first time in more than four decades, to use unlimited amounts of treasury funds to influence the general public to elect their favored candidates. Moreover, the loophole created by this decision is not limited to small, nonprofit advocacy groups, but would permit the vast treasuries of major commercial interests and powerful international unions to be brought to bear to influence directly the outcome of federal elections.

We show below that section 441b was clearly intended to encompass corporate and union expenditures for public distribution of the sort of voter guides regulated by the Commission's rule, whether or not they constitute express advocacy, and that this narrowly defined rule does not implicate the vagueness

and overbreadth concerns that led this Court to adopt the express advocacy limitation. A statutory policy that has protected federal elections for more than forty years should not be eliminated through a process of statutory construction that completely ignores the provision's language, structure, and legislative history. The court of appeals's decision, voiding the Commission's authority to adopt specifically targeted regulations implementing clear congressional intent in enacting this statute to protect the integrity of the federal election process, presents a question of the highest national importance that fully warrants review by this Court.

I. SECTION 441b IS NOT LIMITED TO EXPENDITURES FOR "EXPRESS ADVOCACY"

The language, history, structure, and purposes of 2 U.S.C. § 441b clearly establish that Congress intended it to regulate some expenditures by corporations and unions that do not involve "express advocacy." In construing the provision, the court of appeals failed even to examine these controlling indicia of statutory interpretation. Instead, it relied on this Court's dictum in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." The traditional tools of statutory construction preclude this reading of the provision and no court may "judicially rewrit[e]" a statute to avoid constitutional questions. *CFTC v. Schor*, 478 U.S. 833, 841 (1986). *See also Rust v. Sullivan*, 59 U.S.L.W. 4451, 4456 (1991). The Court should, therefore, reconsider and overrule the statement in *Massachusetts Citizens for Life* that led to the decision below.

The language of 2 U.S.C. § 441b explicitly prohibits all expenditures financed by corporate or union treasury funds made "in connection with" any federal election. The court of appeals acknowledged (App. 6a) that, "[o]n its face, the statute appears to allow for a very broad application," and the district court agreed (App. 18a) that section 441b "on its face" extends to voter guides as defined in the Commission's regulation. The breadth of the section's language contrasts starkly with the narrowness of other provisions of the Act that Congress explicitly limited to "express advocacy" after *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* 2 U.S.C. §§ 431(9)(B)(iii), 431(17), and 441d(a). This contrast alone raises a strong inference that Congress did not intend to limit application of section 441b to expenditures for "express advocacy." *See Russello v. United States*, 464 U.S. 16, 23 (1983).

The legislative history of section 441b confirms that Congress intended the section to reach beyond "express advocacy." Of particular importance here, the debate on the 1947 legislation that first extended the provision's coverage to "expenditures" clearly shows that Congress intended to prohibit corporations from using their corporate treasuries to help elect or defeat candidates by distributing "colored" comparisons of the candidates' records on issues. *See* 93 Cong. Rec. 6447 (1947) (remarks of Sen. Taft); 93 Cong. Rec. 6446-6447 (1947) (discussion among Sens. Taft, Taylor, and Ball); 93 Cong. Rec. 6447 (1947) (colloquy between Sens. Kilgore and Taft).[5] Only voting

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[5] In *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 409 (1972), the Court found Senator Taft's explanation of the scope of this provision to be "controlling."

record publications limited to "bare statement[s] of actual fact" and "direct quotations" would fall outside the provision's prohibition. 93 Cong. Rec. 6447 (1947) (remarks of Sen. Taft). Limiting the statutory prohibition to explicit exhortations to vote for or against a candidate would remove the dissemination of such "colored" reports of voting records from the purview of the Act, and the courts cannot "interpret a statute so narrowly as to defeat its obvious intent." *United States v. Braverman*, 373 U.S. 405, 408 (1963).

In 1971, Congress adopted an amendment to the prohibition that directly conflicts with the conclusion that section 441b's prohibition is limited to expenditures for "express advocacy." The amendment retained the earlier language extending coverage to any expenditure "in connection with" a federal election. Representative Hansen, the amendment's sponsor, characterized this language as "plainly all-encompassing," and the prohibition it embodied as "the most far-reaching in the entire election law." 117 Cong. Rec. 43,380 (1971) (remarks of Rep. Hansen).

The underlying purpose of the amended prohibition was to prevent corporate and union treasuries from being diverted to federal electoral activities "both because of the effect on the political process of such aggregated wealth and out of concern for the dissenting member or stockholder." 117 Cong. Rec. 43,381 (1971) (remarks of Rep. Hansen).[6]

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[6] This Court has repeatedly acknowledged the compelling importance of these intertwined objectives to preserving the integrity both of government and of the nation's electoral system—objectives articulated by generations of congressmen over decades of legislative adjustment of this important statute. *See, e.g., United States v. CIO*, 335 U.S. 106, 112-20

The Hansen amendment added an exception to the general prohibition, now codified at 2 U.S.C. § 441b (b)(2)(B), that permits corporations to use their treasury funds to conduct "nonpartisan" registration and get-out-the-vote drives among their internal constituents. However, the amendment does not permit the use of such funds for similar drives directed at the general public even if they are "nonpartisan." Representative Hansen emphasized repeatedly that "the amendment I propose insures that such a limitation would have to be observed." 117 Cong. Rec. 43,381 (1971) (remarks of Rep. Hansen). *See also*, 117 Cong. Rec. 43,382, 43,385, 43,387, 43,390 (1971) (remarks of Rep. Hansen).[7] An "express advocacy" limitation in section 441b not only contravenes this explicit congressional intent, but renders section

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(1948); *United States v. UAW*, 352 U.S. 567, 569-87 (1957); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 402-31 (1972); *FEC v. National Right to Work Comm.*, 459 U.S. at 207-10; *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 246-50, 257-62; *Austin v. Michigan State Chamber of Commerce*, 110 S.Ct. at 1397-98.

[7] Rep. Hansen also explained that his amendment was only intended to permit registration drives that are "nonpartisan" in that they "make an effort to reach all those in the area and not merely those who will vote in a certain way. *A failure to respect this limitation would, of course, be a violation of section [441b].*" 117 Cong. Rec. 43,381 (1971) (emphasis added). He similarly made clear that under his amendment the provision was to govern the use of treasury funds even to transport individuals to the polls, without any discussion of candidates or political parties. *See* 117 Cong. Rec. 43,385 (1971) (discussion among Reps. Hansen, Hays, and Cabell); 117 Cong. Rec. 43,387-388 (1971) (discussion among Reps. Ashbrook, Hansen, and Hays). Thus, the amendment was clearly intended to prohibit at least some expenditures that involve no express advocacy at all.

441b(b)(2)(B) entirely superfluous, for by definition "nonpartisan" registration and get-out-the-vote drives could never involve express advocacy of a candidate's election or defeat. It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Finally, as we earlier noted, in 1976 Congress again chose to retain the broad prohibition in section 441b, when the provision was moved from the criminal code to Title 2, even though at the same time Congress changed several other provisions of the Act to limit them to "express advocacy" in the wake of *Buckley*. This action affirmed Congress's intention that section 441b—unlike the provisions that Congress narrowed in 1976—extends beyond expenditures for express advocacy.[8]

In sum, the language, structure, purposes, and legislative history of section 441b clearly establish that Congress designed that provision to regulate some corporate and union expenditures in connection with federal elections that do not involve express advocacy at all. The Court did not examine any of this evidence of congressional intent when it stated in dictum in *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 249, that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." Instead, the Court rested its con-

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[8] For this reason, the court of appeals erred in relying (App. 7a) upon *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), and *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980), both of which construed statutory provisions that Congress did limit to expenditures for express advocacy.

clusion entirely upon a desire to avoid constitutional questions that might arise if the statute were construed more broadly. We show below that those constitutional concerns are not applicable to the regulation at issue in this case, but it is well settled in any event that "in avoiding constitutional questions, the Court may not embrace a construction that 'is plainly contrary to the intent of Congress,'" as we have shown this one to be. *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). *Accord, Rust v. Sullivan*, 59 U.S.L.W. at 4456.

This Court has not hesitated to re-examine its prior dicta once it is shown that the earlier pronouncement is erroneous. *See, e.g., Scarborough v. United States*, 431 U.S. 563, 575 n.11 (1977) ("[F]urther consideration has persuaded us that that was not the choice Congress made"); *Board of Trustees of State Univ. of New York v. Fox*, 109 S.Ct. 3028, 3033 (1989).[9]

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[9] The court of appeals erred in concluding (App. 6a-7a) that this statement was not dictum. In *Massachusetts Citizens for Life*, the Commission alleged that MCFL had violated section 441b by using its corporate funds to distribute a voter guide election newsletter. MCFL defended by arguing that the provision prohibited only expenditures for "express advocacy" and that MCFL's newsletter contained no express advocacy. This Court readily agreed that MCFL's newsletter "falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public." *Massachusetts Citizens for Life*, 479 U.S. at 249-50. The case before the Court did not require any consideration of whether expenditures not involving "express advocacy" would be covered by section 441b. Thus, the Court's

But dicta or not, this Court's statement in *Massachusetts Citizens for Life* should not be left to stand, without any examination of statutory intent, as a bar to the Commission's ability to implement the policies of a statute Congress has long considered of vital importance to the maintenance of the integrity of federal elections.

II. THE COMMISSION DOES NOT LACK STATUTORY AUTHORITY TO PROMULGATE NARROWLY TARGETED REGULATIONS DEFINING UNAMBIGUOUSLY ELECTION-RELATED EXPENDITURES THAT ARE COVERED BY 2 U.S.C. § 441b

This case is a challenge to the facial validity of the Commission's regulation, 11 C.F.R. § 114.4(b)(5)(i), the effect of which is to specify that 2 U.S.C. § 441b requires corporations and unions to finance the public distribution of partisan voter guides from separate segregated funds rather than from their organizational treasuries. No constitutional challenge has been raised in this case; instead, the courts below found the regulation invalid as unauthorized by the statute. In this sort of review, the regulation "may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 59 U.S.L.W. at 4454. *See also, Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). This deferential test is fully applicable to the Commission's implementation of the Act, for "the Commission is precisely the type of agency to which def-

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statement, after a brief, two-paragraph discussion of its construction of a different provision of the Act ten years earlier in *Buckley*, was clearly dictum.

erence should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

There has never been any dispute that 11 C.F.R. § 114.4(b)(5)(i) satisfies this test. As noted *supra*, p. 12, both of the courts below explicitly agreed that the Commission's regulation is consistent with the broad language of section 441b, and we have shown *supra*, pp. 12-15, that the regulation implements congressional intent expressed in the legislative history. Neither respondents nor the courts below have suggested that there is anything in the language, structure, or legislative history of section 441b that conflicts with the Commission's regulation. Indeed, the Commission submitted this regulation to Congress for review pursuant to 2 U.S.C. § 438(d) before promulgating it, and "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (internal quotation marks omitted). *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 34-35.

Although the Commission's regulation thus satisfies the established test for facial validity, the courts below nevertheless found it in conflict with the statute on the basis of this Court's statement in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 249, that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." We have shown above that this statement was erroneous and ought to be overruled. But even if section 441b must generally be limited for constitutional reasons to expenditures for "express advocacy," the Commis-

sion regulation at issue here is narrowly targeted at a specific type of expenditure that is unambiguously election related, and thus does not implicate the vagueness and overbreadth concerns that led the Court to adopt the "express advocacy" limitation.

This Court developed the "express advocacy" standard in *Buckley v. Valeo*, 424 U.S. 1 (1976), in construing two provisions of the Act not involved here. In order to eliminate vagueness and overbreadth in the terms used in those provisions and to ensure that they could not be applied broadly to discussion of issues as well as to "advocacy of a political result," *Buckley*, 424 U.S. at 79, the Court found it necessary to limit the provisions "to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* The Court therefore construed those provisions "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. This construction was designed to exclude from the provisions' coverage communications devoted to issues that are closely associated with particular politicians who are candidates, because discussion of such issues often includes reference to those candidates. *Id.* at 42.

The Commission regulation at issue comports with this approach by narrowly defining a particular type of expenditure that is unambiguously election related. The focus of a voter guide subject to 11 C.F.R. § 114.4(b)(5)(i) is upon a direct comparison of clearly identified candidates in specific upcoming elections. The sole purpose of such a voter guide is to assist voters in choosing which of the named candidates they will support at the polls, and issues are

presented in such a guide as a basis for choosing among the candidates, not to promote a position on the issues themselves. When such a voter guide is written to tell the reader which candidate's position is supported by the union or corporation, and which candidate's position is opposed, it is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987).

The court of appeals concluded that the regulation's limitatons on specifying, in such a voter guide, the position of the corporation or union on the issues used to compare candidates constitutes the sort of restriction on issue advocacy that the "express advocacy" test was designed to foreclose. However, the regulation is only applicable when the corporation or union presents its position on issues as the touchstone for choosing among competing federal candidates, and does so in the specific comparative format of a voter guide. The regulation is, therefore, properly directed at advocacy of candidates rather than of issues; it affects statements on issues only when they are used, in the form of a voter guide, as a signal as to which candidate the corporation or union supports or opposes. Thus, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 249, this Court found that a voter guide went "beyond issue discussion to express electoral advocacy" by using advocacy of the issues upon which the candidates were compared to signal the corporation's candidate preference. "The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." *Id. See also United States v. Lewis Food Co.*, 366 F.2d 710, 712 (9th Cir. 1966) ("[T]he 'Notice to Voters' was

not intended to give an objective report on the voting record of public office holders . . . [but] makes it plain that, in [the corporation's] opinion, those office holders who are given low ratings on their votes . . . should not be reelected").

In sum, in the special context of a voter guide, the expression of support for the position of one of the identified competing candidates over the views of the other candidates is an unmistakable signal that the voter should choose the favored candidate at the polls. "[E]ven if it is not presented in the clearest, most explicit language, speech is 'express' . . . if its message is unmistakable and unambiguous, suggestive of only one plausible meaning." *FEC v. Furgatch*, 807 F.2d at 864. Because the voter guide format itself conveys the "unmistakable" message that the voter should use it as the basis for selecting candidates at the polls, the Commission's regulation does not contravene the purposes of the express advocacy test.

The regulation in this case does not appreciably infringe the ability of a corporation or union to advocate its position on issues. First, corporations and unions can use their treasury funds to finance communications on any subject, including electoral advocacy, to their executives, stockholders, and members and those individuals' families. 2 U.S.C. § 441b(b)(2)(A). Second, any corporation or union can lawfully distribute to the general public a partisan voter guide that expresses support for or opposition to a particular candidate as long as the corporation's separate segregated fund pays the costs of the guide. Third, and most important, the regulation has no application at all to the use of corporate and union treasury funds to advocate positions on issues as long

as such advocacy is not presented as the touchstone for choosing candidates in a voter guide.

Difficult questions may be presented when a corporation or union makes an expenditure for a communication that includes issue advocacy and also discusses candidates for federal office, and constitutional concerns require care in such circumstances in distinguishing election-related matters subject to section 441b from issue advocacy that is not. But the regulation in this case does not pose that difficulty, for it is not applicable at all unless the corporation or union chooses to frame its communication as a voter guide that explicitly compares the competing candidates in an upcoming election. The regulation serves an important purpose in implementing the protection of the electoral process Congress enacted in 2 U.S.C. § 441b, and any corporation or union wishing to engage in issue advocacy can do so without implicating this regulation simply by avoiding the comparative voter guide format. *Cf. NLRB v. Gissel Packing Company*, 395 U.S. 575, 620 (1969).

The court of appeals held that the Commission has no authority to promulgate such specific rules implementing congressional intent in this area, even if they do not contravene the concerns underlying the "express advocacy" test. The Commission's authority to implement section 441b is an issue of great importance to the administration of the campaign financing statutes that this Court has found to serve vital national interests, and clearly warrants review by this Court.

CONCLUSION

For the reasons stated above, the Federal Election Commission's petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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June 19, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1832

SANDRA FAUCHER AND MAINE RIGHT TO LIFE COMMITTEE, INC., PLAINTIFFS, APPELLEES,

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT, APPELLANT.

Appeal from the United States District Court
for the District of Maine
[Hon. D. Brock Hornby, *U.S. District Judge*]

March 21, 1991

Before

Torruella and Selya, *Circuit Judges*,
and Pollak,* *Senior District Judge.*

Richard B. Bader, Associate General Counsel, with whom *Lawrence M. Noble*, General Counsel, and *Vivien Clair*, Attorney, were on the brief for appellant.

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* Of the Eastern District of Pennsylvania, sitting by designation.

James Bopp, Jr., with whom *Richard E. Coleson*, *Brames, McCormick, Bopp & Abel*, *Bryan M. Dench* and *Skelton, Taintor & Abbott*, were on brief for appellees.

TORRUELLA, *Circuit Judge*. Pursuant to a suit filed by the Maine Right to Life Committee, Inc. ("MRLC") and Sandra Faucher, a member of MRLC's Board of Directors, seeking declaratory judgment and injunctive relief, the United States District Court for the District of Maine (Hornby, J.) adjudged a Federal Election Commission ("FEC") regulation, 11 C.F.R. § 114(b)(5)(i), invalid as unauthorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* [hereinafter FECA]. We find no reason to disturb that ruling on appeal.

FACTS

MRLC is a nonprofit membership corporation organized for the purpose of promoting pro-life issues. MRLC is not affiliated with any political party or campaign committee and does not engage in any business activities other than fundraising. There are approximately 1,800 members associated with the corporation.

MRLC publishes a bi-monthly newsletter, containing educational articles and news of local chapter activities, which is mailed directly to all dues-paying members and is also made available to the general public through schools, churches, etc. Before elections, MRLC conducts candidate surveys to ascertain federal and state candidates' positions on pro-life issues. The survey responses are published in the newsletter. Publication costs for the newsletter are drawn from the corporation's general and educational

funds rather than the separate segregated funds of its political action committee.

In 1985, Faucher and MRLC first filed suit against the FEC and the United States Attorney General challenging the validity of FEC regulations governing the publication of voter guides by corporations found at 11 C.F.R. § 114.4(b)(5)(i). That suit was stayed pending the outcome before the Supreme Court of *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238 (1986). Thereafter, on February 24, 1989, the suit was dismissed on the ground that the plaintiffs first needed to obtain an FEC advisory opinion as to the legality of any proposed publication. An advisory opinion was sought in May 1989. MRLC submitted a 1988 voter guide to the FEC, which was substantially similar to the guide proposed for 1990. The 1988 guide was entitled "November Election Issue 1988!," was subheaded "Federal & State Candiate Surveys Enclosed—Take-along Issue for Election Day!" featured candidate and party positions on pro-life issues, and contained the following statement: "PLEASE NOTE: A 'yes' response indicates agreement with the National Right to Life position on each question." The guide did, however, also carry a disclaimer which read: "The publication of the MRLC November Election Candidate Survey does not represent an endorsement of any candidate(s) by MRLC."

On February 14, 1990, the FEC issued its advisory opinion, finding the plaintiff's publication unacceptable because it favored a pro-life position and therefore did not qualify as "nonpartisan" under the regulation. As a result, the plaintiffs filed the current lawsuit on April 12, 1990, seeking declaratory judgment (a) that the disputed regulation went beyond

the statutory authority and was unconstitutionally vague and (b) that MRLC's proposed 1990 voter guide violated neither the FECA nor the FEC voter guide regulations. An application for preliminary injunction was filed on May 23, 1990. The FEC and Attorney General filed motions to dismiss on June 1, 1990. Following a hearing on June 4, 1990, the application for preliminary injunction was consolidated with the action on its merits.

The district court decided only the issue of whether the regulation in question fell within the statutory authority of the FECA, finding that the plaintiffs lacked standing to challenge the regulation on any of the several other asserted grounds. The district court also found that injunctive relief was inappropriate as that issue was not yet ripe for review. After a careful examination of controlling law, the district court concluded that "the regulation, as promulgated with its focus on issue advocacy, is contrary to the statute [28 U.S.C. § 441b] as the . . . Supreme Court has interpreted it, and therefore, beyond the power of the FEC."

DISCUSSION

Section 441b(a) of the FECA prohibits corporations from using general treasury funds to make "contribution[s] or expenditure[s] in connection with any [federal] election." [1] The FEC, entrusted with regulatory power under the FECA, has interpreted this provision very broadly to include a ban on cor-

[1] Section 441b(b)(2)(C) allows corporations to establish separate segregated funds for this purpose; however, the action taken by MRLC involved general corporate funds. This section is, therefore, irrelevant to a determination of the instant case.

porate financed activities involving express advocacy, discussed *infra* p. 6, as well as issue advocacy. The regulation in question, 11 C.F.R. § 114.4(b)(5), states:

> (5) *Voter guides.* (i) A corporation . . . may prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to these questions. The following are factors that the Commission may consider in determining whether a voter guide is nonpartisan:
>
> * * * *
>
> (C) The wording of the questions presented does not suggest or favor any position on the *issues* covered;
>
> (D) The voter guide expresses no editorial opinion concerning the *issues* presented nor does it indicate any support for or opposition to any candidate or political party.

(Emphasis added).

A.

First, we face the question of whether the FEC has the authority, under section 441b(a), to restrict issue advocacy or whether the FEC may only restrict express advocacy. Since determining whether a regulation is "reasonably related" to the purposes of the underlying statute is a question of law, this court reviews the district court's decision de novo. *See, e.g., Massachusetts* v. *Secretary of Health and Human Services*, 816 F.2d 796, 801 (1st Cir. 1987), *rev'd in part on other grounds sub nom., Bowen* v. *Massachusetts*, 487 U.S. 879 (1988).

We begin by defining the scope of the statute. On its face, the statute appears to allow for a very broad application. Our inquiry, however, does not end there.

The Supreme Court, recognizing that such broad language as found in section 441b(a) creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to "express advocacy." *Buckley* v. *Valeo*, 424 U.S. 1, 42-43 (1976); *see also United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369, *reh'g denied*, 403 U.S. 924, *reh'g denied sub nom.*, *United States* v. *Reidel*, 403 U.S. 924 (1971) ("When the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"). Express advocacy is language which "in express terms advocate[s] the election or defeat of a clearly identified candidate" through the use of such phrases as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Buckley*, 424 U.S. at 44 and n.52. This express advocacy test was again embraced by the Supreme Court in the more recent case of *Massachusetts Citizens for Life*. *See Massachusetts Citizens for Life*, 479 U.S. at 249. The FEC, however, maintains that the language relied upon in *Massachusetts Citizens for Life* was mere dictum and therefore not binding on this court. We do not agree. All nine Justices assented to that portion of the opinion which states: "We therefore *hold* that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.* at 249 (emphasis added). We cannot accept that in resolving

constitutional issues such as the one presented in *Massachusetts Citizens for Life*, the Supreme Court proclaims the law lightly. The Court's "basis for deciding [should] not [later be treated as] dictum [simply] because a critic would have decided on another basis." Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 385-86 (1964).

In further support of this position, we note that the second and the ninth circuits have both likewise recognized the express advocacy test. *See Federal Election Commission* v. *Central Long Island Tax Reform*, 616 F.2d 45, 53 (2d Cir. 1980) (section 441d "clearly establish[es] that, contrary to the position of the FEC, the words 'expressly advocating,' mean exactly what they say"); *Federal Election Commission* v. *Furgatch*, 807 F.2d 857, 860 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) ("We must apply [the FECA] consistently with the constitutional requirements set out in *Buckley*").

We turn next to the issue of whether 11 C.F.R. § 114.4(b)(5) falls within the scope of section 441b (a). Ordinarily, when a statute is silent or ambiguous, "considerable weight should be accorded to an executive department's construction of a statutory scheme it [has been] entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1983), *reh'g denied sub nom., American Iron and Steel Institute* v. *Natural Resources Defense Council, Inc.*, 486 U.S. 1227 (1984). That rule of construction no longer applies, however, once the Supreme Court has spoken on the issue. The Supreme Court is the final authority with respect to statutory construction; therefore, an interpretation

given a statute by the Supreme Court becomes the law and must be given effect. *Id.* at 843 n.9. It is not the role of the FEC to second-guess the wisdom of the Supreme Court.

In limiting section 441b(a) to express advocacy, the Court in *Buckley* clearly had the protection of issue advocacy in mind. *Buckley* reads: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley*, 424 U.S. at 14-15. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14. The FEC nevertheless has sought to restain that very same activity which the Court in *Buckley* sought to protect. This we cannot allow.

B.

In the alternative, the FEC argues that even if section 441b(a) is restricted to express advocacy, the speech sought to be regulated in this case was express advocacy and therefore falls within the scope of the FECA. To the extent that this argument asks us to treat the regulation, despite its multiple references to "issue advocacy," as reaching only "express advocacy," the Supreme Court has barred such word games. *See, e.g., Buckley*, 424 U.S. at 42-44 (expressing concern that the "distinction between discussion of issues and candidates may often dissolve in practical application" and adopting a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation); *see also Massachusetts Citizens for Life*, 479 U.S. at 249. In *Buckley*, the Court quoted *Thomas* v. *Collins*, 323 U.S. 516 (1945), approvingly,

on the difficulty of interpreting the meaning and effects of words:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43 (quoting *Collins*, 323 U.S. at 535). In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.

To the extent that the argument asks that we strike only the impermissible parts of the regulation, we cannot oblige, because we find it necessary to invalidate 11 C.F.R. § 114.4(b)(5)(a) as a whole. We take such action because the regulation's definition of "nonpartisan" inextricably binds its prohibition of issue advocacy with its prohibition of express advocacy. We are therefore unable to sever the offending

portion of the regulation from that portion dealing with express advocacy which might otherwise be valid. *Cf. Hodgson* v. *Minnesota*, —— U.S. ——, 110 S. Ct. 2926, 2934 (1990) (when an invalid portion of a statute (or regulation) cannot be severed from the whole, the entire statute must fall).

CONCLUSION

The first amendment lies at the heart of our most cherished and protected freedoms. Among those freedoms is the right to engage in issue-oriented political speech. The highest court of this land has expressly recognized that as a nation we have a "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). *Buckley* and *Massachusetts Citizens for Life* ensured that right for corporations as well as individuals by limiting the scope of the FECA to express advocacy. We therefore uphold the district court in striking down 11 C.F.R. § 114.4(b)(5)(1) for having overstepped the regulatory boundaries imposed by the FECA as interpreted by the Supreme Court.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1832

SANDRA FAUCHER and
MAINE RIGHT TO LIFE COMMITTEE, INC.,
PLAINTIFFS, APPELLEES,

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT, APPELLANT.

JUDGMENT

Entered March 21, 1991

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Francis P. Scigliano
Clerk

(cc: Messrs. Bader, Bopp, Jr.)

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No.: 90-0112-B

SANDRA FAUCHER and MAINE
RIGHT TO LIFE COMMITTEE, INC.,
PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION
and RICHARD THORNBURGH, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HORNBY, District Judge

BACKGROUND

In 1985, Faucher and the Maine Right to Life Committee (MRLC) sued the Federal Election Commission (FEC) and the United States Attorney General in this Court, challenging FEC regulations governing the publication of voter guides by corporations. That suit was stayed pending the outcome of a United States Supreme Court decision ultimately handed down in 1986. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). On February 24, 1989, the lawsuit was dismissed on the ground that the plaintiffs needed first to obtain an FEC advisory opinion on the legality of any proposed publication.

708 F. Supp. 9 (D. Me. 1989). The plaintiffs sought such an advisory opinion on May 15, 1989. The FEC requested additional information, which the plaintiffs provided on October 24, 1989. The FEC then issued its advisory opinion February 14, 1990, finding the plaintiffs' proposed publication illegal because (a) MRLC has a policy of accepting contributions from corporations and has, in fact, accepted such contributions, thus distinguishing its circumstances from the publication permitted by the Supreme Court in *FEC v. Massachusetts Citizens for Life*; and (b) MRLC's proposed publication does not meet the factors contained in the Commission's regulations permitting nonpartisan voter guides, inasmuch as the proposed publication suggests that the MRLC does favor a position, specifically a pro-life position.

The plaintiffs filed the current lawsuit against the same defendants on April 12, 1990. They filed an application for preliminary injunction on May 23, 1990. A telephone scheduling conference was held with counsel on May 25, 1990. The FEC and Attorney General filed their motions to dismiss on June 1, 1990. A hearing on the application for preliminary injunction was held on June 4, 1990. At that time all parties agreed to stipulate to the record before the Court, and the trial of the action on the merits was advanced and consolidated with the hearing on the application for preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2).

FACTS

Maine Right to Life Committee, Inc., is a nonprofit membership corporation exempt from federal income tax under Internal Revenue Code § 501(c)(4). MRLC has approximately 1,800 members. Sandra Faucher is a member of the Board of Directors.

MRLC is not affiliated with any political party or campaign committee, but is an ideological organization whose purpose is to promote the sanctity of human life, both born and unborn, and educate the public on pro-life issues. MRLC does not engage in business activities other than the raising of funds to carry out the corporation's expressed purposes. It has established a separate segregated fund designated as the Maine Right to Life Committee Political Action Committee (PAC).

Over the years, MRLC has received non-PAC contributions from corporations or businesses as follows:

	Government/Business Contributions	Total non-PAC Contributions
1984	$365	$31,879.71
1985	87	48,614.68
1986	175	69,286.78
1987	393	74,321.31
1988	285	66,607.46
1989	470	70,999.25

MRLC has no written policy regarding the acceptance of corporate or business contributions. MRLC publishes a bi-monthly newsletter using its general and education funds, but not its PAC funds.

The newsletter. containing educational articles and news of local chapter activities, is mailed to all dues-paying members of MRLC and handed out to members of the public in schools, churches and elsewhere. Before an election, MRLC conducts a candidate survey to ascertain federal and state candidates' positions on pro-life issues. The survey responess are published in the newsletter. The November 1988 issue of the newsletter was entitled "November Election Issue 1988!" The subheading was "Federal &

State Candidate Surveys Enclosed—Take-along Issue for Election Day!" The front page featured pictures of George Bush and Michael Dukakis with copy concerning the positions of the presidential and vice-presidential candidates and the respective party platforms on pro-life issues. The second, third and fourth pages featured the questionnaire and the candidates' responses. The newsletter stated:

> *Please recheck your candidate's survey*, even if you already received our primary survey issue. The fall polling pulled in some new respondents, and those who did not respond at all need to be contacted by pro-life constituents so that their positions can be determined. *It is vital that your local candidate hear from you on this issue.* Please look this survey over carefully, contact your local candidates, and call the MRLC office to report your results!

(emphasis original). The newsletter also stated, "The publication of the MRLC November Election Candidate Survey does not represent an endorsement of any candidate(s) by MRLC."

MRLC plans to publish newsletter issues for the 1990 Maine election and primary "substantially similar" to the November 1988 voter guide.[1]

RELIEF REQUESTED

The plaintiffs seek a declaratory judgment that the FEC's voter guide regulations are beyond the authority of the FEC and unconstitutionally vague; a declaratory judgment that the MRLC's proposed 1990

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[1] I am aware that the primary election has taken place. No 1990 version of the publication, however, has been provided to the Court.

publications are permissible under the Federal Election Campaign Act of 1971 as interpreted by the United States Supreme Court; and an injunction against the defendants to prevent them from enforcing the regulations against the plaintiffs' 1990 publications. The plaintiffs also seek attorneys' fees and costs.

The defendants have moved to dismiss the action for lack of jurisdiction, failure to state a claim upon which relief can be granted and the inappropriateness of equitable relief.

DECLARATORY JUDGMENT CHALLENGE TO THE FEC REGULATIONS

A federal court has authority to review a challenge to the legality of federal agency regulations under the Administrative Procedure Act (APA) under certain circumstances. Specifically, final agency action for which there is no other adequate remedy in a court is subject to judicial review. 5 U.S.C. § 704. Parties who are "adversely affected or aggrieved by agency action" may seek that review. 5 U.S.C. § 702. Here, the FEC's promulgation of regulations is final agency action. *Cf. Sherwin v. Secretary of Health & Human Services*, 685 F.2d 1, 4-5 (1st Cir. 1982). The plaintiffs are aggrieved persons because MRLC is a nonprofit corporation that has published and seeks to continue publishing voter guides that take a position on issues such as abortion, and the FEC has promulgated specific regulations that directly affect what the plaintiffs [2] may say in their voter guides. Specifically, the regulations restrict organizations

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[2] The parties have not distinguished between the two plaintiffs on standing or any other grounds.

such as MRLC from taking a position on the issue in their voter guides. Compliance with those regulations, which the plaintiffs assert to be illegal, thus directly affects their activities. The United States Supreme Court has declared that judicial review is presumed to be available under the APA "absent some clear and convincing evidence of legislative intent to preclude review." *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 n.4 (1986). I find no such clear and convincing evidence in the FEC statute, either explicit or implicit in the statutory structure. It is true that the statute provides for conciliation when the FEC determines that a violation has occurred, 2 U.S.C. § 437g, and that it provides an unusual form of judicial review when the statute itself is challenged as unconstitutional, 2 U.S.C. § 437h (immediate certification to the Circuit Court of Appeals sitting *en banc*). The statute also specifically provides for judicial review when a complainant is dissatisfied with an FEC decision that no illegality has occurred. 2 U.S.C. § 437g(a)(8)(A). Although these factors, with others, lead me later to conclude that this controversy is not appropriate for declaratory and injunctive relief with respect to the proposed 1990 publications, there is not enough in this statutory structure to persuade me that Congress intended to preclude ordinary APA judicial review of the validity of the regulations. Accordingly, I have authority under 5 U.S.C. § 706(2)(C), to determine whether those regulations exceed the FEC's authority. *Cf. Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-148 (1967).[3]

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[3] The plaintiffs are not seeking judicial review of an advisory opinion. The reasoning of *United States Defense Committee v. FEC*, 861 F.2d 765 (2d Cir. 1988) is therefore inapplicable.

The statutory basis for the regulations in question is 2 U.S.C. section 441b(a). It prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any election a which . . . a Senator or Representative . . . [is] to be voted for, or in connection with any primary election . . . held to select candidates for any of the foregoing offices . . . ." On its face, this language directly prohibits a corporation like MRLC from making any expenditures to publish its voter guides in connection with the 1990 elections.[4] I am satisfied, however, that under *Buckley v. Valeo*, 424 U.S. 1 (1976), as construed in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Supreme Court on constitutional grounds has explicitly limited the scope of this prohibition to "express advocacy" of the election or defeat of a clearly identified particular candidate or candidates. I do not accept the FEC's argument that this narrowing of the statutory prohibition to "express advocacy" is not binding on this Court. The Supreme Court specifically said: "We therefore *hold* that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249 (emphasis supplied); *accord*, *FEC v. NOW*, 713 F. Supp. 428, 433-34 (D.D.C. 1989). Nothing could be clearer.

It is undisputed that the FEC has not amended its regulation on this subject to reflect the Supreme Court's statements in *FEC v. Massachusetts Citizens*

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[4] 2 U.S.C. § 441(b)(d)(2)(C) does permit a corporation to establish a separate segregated fund for political purposes and MRLC has done so, establishing its own PAC. But the controversy before the Court involves use of MRLC's corporate funds apart from its PAC funds.

for Life. The pertinent regulation is contained in 11 C.F.R. § 114.4(b)(5)[5]. That regulation permits a

[5] (5) *Voter guides.* (i) A corporation or labor organization may prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. The following are factors that the Commission may consider in determining whether a voter guide is nonpartisan:

(A) The questions are directed to all of the candidates for a particular seat or office, giving the candidates equal time to respond, except that in the case of Presidential and Vice Presidential candidates the questions may be directed only to those candidates seeking the nomination of a major party or to those appearing on the general election ballot in enough States to win a majority of the electoral votes;

(B) The voter guide reprints verbatim the responses of each candidate to whom questions were sent, without any additional comment, editing, or emphasis, although the sponsoring organization may impose limitations on the number of words per response when the questions are initially sent to the candidates for their comments;

(C) The wording of the questions presented does not suggest or favor any position on the issues covered;

(D) The voter guide expresses no editorial opinion concerning the issues presented nor does it indicate any support for or opposition to any candidate or political party;

(E) The sponsor may ask each candidate to provide biographical information such as education, employment positions, offices held, and community involvement and may impose a limitation on the number of words per submission;

(F) The voter guide is made available to the general public in the geographic area in which the sponsoring organization normally operates.

(ii) A corporation or labor organization may distribute voter guides or other types of brochures describ-

corporation to publish voter guides in certain circumstances. Under the regulation, the critical element for the FEC is whether a voter guide is "nonpartisan." In making that determination, the Commission considers such factors as whether the wording "suggest[s] or favor[s] any position on the *issues* covered" and whether it expresses any "editorial opinion concerning the *issues* presented," 11 C.F.R. § 114.4 (b)(5)(i)(C), (D) (emphasis supplied). This approach ignores the clear language of *FEC v. Massachusetts Citizens for Life* that issue advocacy by a corporation *cannot* constitutionally be prohibited and that only express advocacy covering the election or defeat of an identifiable candidate or candidates is constitutionally within the statute's prohibition.

I conclude, therefore, that the regulation, as currently promulgated with its focus on issue advocacy, is contrary to the statute as the United States Supreme Court has interpreted it and, therefore, beyond the power of the FEC.

I do not reach the question whether the regulation is also invalid for assertedly failing to apply *FEC v. Massachusetts Citizens for Life*'s holding that the statute cannot constitutionally limit even express advocacy by certain categories of nonprofit membership corporations. In *FEC v. Masachusetts Citizens for Life*, the Supreme Court made clear that one of the

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ing the candidates or their positions which are obtained from a nonprofit organization which is exempt from Federal taxation under 26 U.S.C. 501(c)(3) or (4) and which does not support, endorse or oppose candidates or political parties. Publications obtained from such nonprofit organizations need not comply with the guidelines set forth at 11 CFR 114.4(b)(5)(i), but they may not favor one candidate or political party over another.

"essential" factors for its holding was that the non-profit corporation there did not receive, *and had a policy of not receiving*, any corporate funds. 479 U.S. at 263. Where a nonprofit corporation did receive corporate funding, as in *Austin v. Michigan Chamber of Commerce*, —— U.S. ——, 108 L.Ed.2d 652 (1990), the Court declared that it was not exempt from the prohibition because "[b]usiness corporations therefore could circumvent the Act's restrictions by funneling money through the Chamber's general treasury." 108 L.Ed.2d at 667. Here, although the amounts received by MRLC from corporations have been comparatively modest, they are obviously not subject to any control. Without an explicit policy against contributions from corporations, the risk remains that an organization like MRLC could "serv[e] as [a conduit] for the type of direct spending that creates a threat to the political marketplace." *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 264. It is this potential for influence that supports the restriction on corporate funding. *Id.* at 263. Since MRLC clearly does not fit within the category of non-profit corporations to which the Supreme Court spoke in *Massachusetts Citizens for Life*, I conclude that the plaintiffs do not have standing to challenge the FEC regulation on this score.

I also do not address the plaintiffs' challenge to the FEC's asserted failure to provide a regulatory exemption reflecting the statutory exemption of "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newsaper, magazine, or other periodical publication . . . ." 2 U.S.C. § 431(9)(B)(i). I am satisfied that the MRLC does not fit within this media exemption.

See Austin v. Michigan Chamber of Commerce, 108 L.Ed.2d at 669-70 (construing similar language in a state statute to apply to "media corporations"). The plaintiffs therefore do not have standing to challenge the FEC's asserted failure in this regard.

Finally, I do not address the plaintiffs' challenge to 11 C.F.R. § 114.4(b)(5)(ii)—the assertion that the regulation is unconstitutionally vague in directing that certain publications "not favor one candidate or political party over another." That portion of the regulation affects the voter guides only of non-profit, tax-exempt corporations that do not "support, endorse or oppose candidates or political parties." [6] Since MRLC has estbalished a PAC that does support, endorse or oppose candidates, that portion of the regulation does not apply to it. Therefore, the plaintiffs do not have standing to challenge the asserted vagueness of that portion of the regulation.

REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AS IT APPLIES TO THE PROPOSED 1990 PUBLICATIONS

The plaintiffs have done what the first *Faucher* decision instructed them to do: they have obtained an FEC advisory opinion. That advisory opinion demonstrates that the FEC considers their 1988 voter guide or any substantially similar publication to be illegal under its regulations. I nevertheless conclude that their request for declaratory and injunctive relief to prevent any FEC or Attorney General enforce-

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[6] The Commission has previously held that a tax-exempt corporation becomes an organization that supports, endorses or opposes candidates if it establishes a separate, segregated PAC fund that does so. Advisory Opinion 1984-17.

ment action against their proposed 1990 publications is still not ripe for determination by this Court.

From the record before me, I know only that the new publications will be "substantially similar" to the 1988 publication. In determining what is "express advocacy" and what is not, however, language and format are critical. *Buckley v. Valeo* focused on explicit wording such as "vote for" and "elect."[7] I am not prepared to base declaratory and injunctive relief upon a 1988 publication, when minor changes could make that ruling wholly inapplicable to the actual 1990 publications.[8] At the very least, it would

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[7] In *Buckley v. Valeo*, the Court described this category of express advocacy as involving explicit language such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." 424 U.S. 1, 44 n.52 (1976).

[8] In the 1988 version there is a disclaimer stating that "the publication of the MRLC November Election Candidate Survey does not represent an endorsement of any candidate(s) by MRLC." In addition, there is nowhere any express urging to vote for a particular candidate or party. On the other hand, the context suggests that the issue is intended to influence people's voting behavior. It is entitled "Election Issue" and is described as a "Take-along Issue for Election Day!" The viewpoints of the candidates are elaborated with specific reference to the position of the Maine Right to Life Committee and National Right to Life Committee and the publication makes clear which candidates support the views of these organizations. Slight changes in wording and format could easily affect a conclusion as to whether this is express advocacy. It seems logical, moreover, that more than slight changes in format will be necessary. The 1988 issue devoted its front page to the presidential campaign, and there is obviously no such campaign this year. Furthermore, the candidates are different from the candidates in the 1988 issue. It is difficult, therefore, to know what exactly is meant when it is said that the proposed publications are "substantially similar" to the 1988 publication.

probably bring the parties back to court to argue whether the new publications were "substantially similar."

Equally important, the new voter guide, because of its ultimate wording and format, may not raise the FEC's ire and a decision may therefore never be needed on whether FEC enforcement against the publication is permissible.

The Attorney General has an enforcement role only if there is a knowing and willful violation that involves over $2,000. 2 U.S.C. § 437g(d)(1)(A). The plaintiffs' affidavit in their previous lawsuit said that the per issue cost of a newsletter was $628 ($350 for printing, $278 for postage). The affidavit also indicates that there are no plans to increase the circulation. There is thus no suggestion that the cost of two election issues will exceed $2,000.[9]

Finally, although I have concluded that the Court has the authority to review the validity of the FEC regulations under the APA, the statutory role of the FEC in enforcement activities gives me some pause in issuing declaratory and injunctive relief concerning particular publications. Conciliation between the FEC and any alleged law violator is a primary element of the enforcement provisions. *See* 2 U.S.C. § 437g. In the case of these proposed newsletters, there may never be any complaints by anyone (apparently no one has complained about previous MRLC newsletters); the Commission may find no

[9] Moreover, the plaintiffs have not contradicted the assertion that the Justice Department policy (summarized in the FEC's brief at p. 21, n.13) is only to prosecute criminally if large sums are involved and clandestine means are used to disguise their use.

violation in the ultimate wording of the newsletter; the Commission may decide that any violation is only *de minimis* and not worthy of pursuit; conciliation may lead to voluntary minor changes in wording that satisfy the Commission; or MRLC may find acceptable some other outcome—for example, a minor penalty such as refunding the amount of its corporate contributions. Only if none of these occur would an FEC enforcement action be necessary. Injunctive and declaratory relief now would unnecessarily restrain the FEC's discretion and would provoke hard and fast judicial line-drawing in a context where the statutory enforcement apparatus clearly favors conciliation and avoidance of litigation over specific election issues.

I am not persuaded that the plaintiffs' First Amendment arguments justify the relief they seek for 1990 publications in the face of the concerns I have enumerated. They contend that they are chilled in their freedom of speech and expression if they must publish in the context of possible enforcement proceedings. Nevertheless, they have been publishing the newsletter and voter guides in previous years despite the possibility of enforcement. As I have already stated, there is no threat, or even any suggestion, of criminal prosecution. The civil litigation threat is minimal. The penalty would be limtied to a maximum of $10,000 under 2 U.S.C. section 437g(a)(6) (because the cost of the publication is far less than that). The penalty, to be set by a United States District Court, could be far less. The cost of defending such civil litigation cannot be considered a major deterrent. It is probably no more expensive than the proceedings that the plaintiffs have voluntarily undertaken in trying to secure their injunction. Finally,

the likelihood of civil litigation is minimal given the conciliation requirements of the statute and the FEC's failure to take any action with respect to previous publications.

Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967) identified two factors for a federal court to consider in determining whether a controversy is ripe for resolution: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." The facts provided by the parties in this case simply do not make the issue of declaratory and injunctive relief fit for judicial decision. In a context were words and nuances may be critical, I do not have the actual language and format of the publications. Given the FEC's enforcement role, which I have outlined, such relief would unduly interfere with the overall ability of that agency to conduct investigations of alleged violations, might well delay it in gathering important information and would interfere with the congressional goal of resolving specific election disputes through conciliation. The scope of any declaratory relief or injunction would probably be confusing, given the likelihood that there will be changes in the new publications. An injunction may in fact be wholly unnecessary. Finally, any hardship to the parties in finding this issue not ripe is minimal, given the plaintiffs' historical practice of publishing despite any uncertainty.

Accordingly, the plaintiffs' request for declaratory and injunctive relief with respect to 1990 publications is *DENIED*; and the plaintiffs request for declaratory judgment is *GRANTED* as follows:

IT IS HEREBY ADJUDGED that the regulation found in 11 C.F.R. § 114.4(b)(5)(i) is invalid as not

authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), to the extent that the regulation makes the permissibility of voter guides published by corporations hinge upon whether such guides are "nonpartisan" in a broad sense that includes issue advocacy rather than the narrower test of "express advocacy."

The Clerk shall enter judgment accordingly.

Dated at Bangor, Maine this 29th day of June, 1990.

/s/ D. Brock Hornby
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No.: 90-0112-B

SANDRA FAUCHER and MAINE
RIGHT TO LIFE COMMITTEE, INC., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION and
RICHARD THORNBURGH, DEFENDANTS

DECLARATORY JUDGMENT

This action came on for hearing before the Court and the Court having made its findings of facts and conclusions of law,

IT IS HEREBY ADJUDGED that the regulation found in 11 C.F.R. § 114.4(b)(5)(i) is invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), to the extent that the regulation makes the permissibility of voter guides published by corporations hinge upon whether such guides are "nonpartisan" in a broad sense that includes issue advocacy rather than the narrower test of "express advocacy."

Dated at Bangor, Maine this 2nd day of July, 1990.

/s/ D. Brock Hornby
United States District Judge

APPENDIX C

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

Subchapter 1—Disclosure of Federal Campaign Funds

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of

any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advantage, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for po-

litical purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.
(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicition, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

APPENDIX D

11 CFR Ch. 1 (1-1-90 Edition)

Federal Election Commission

§ 114.4

* * * *

(b) *Nonpartisan communications by corporations and labor organizations to the general public*—(1) *General.* A corporation or labor organization may make the communications described in 11 CFR 114.4 (b)(2) through (5) to the general public. The corporation or labor organization may include its logo or otherwise identify itself as the sponsor of the communication.

* * * *

(5) *Voter guides.* (i) A corporation or labor organization may prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. The following are factors that the Commission may consider in determining whether a voter guide is nonpartisan:

(A) The questions are directed to all of the candidates for a particular seat or office, giving the candidates equal time to respond, except that in the case of Presidential and Vice Presidential candidates the questions may be directed only to those candidates seeking the nomination of a major party or to those appearing on the general election ballot in enough States to win a majority of the electoral votes;

(B) The voter guide reprints verbatim the responses of each candidate to whom questions were

sent, without any additional comment, editing, or emphasis, although the sponsoring organization may impose limitations on the number of words per response when the questions are initially sent to the candidates for their comments;

(C) The wording of the questions presented does not suggest or favor any position on the issues covered;

(D) The voter guide expresses no editorial opinion concerning the issues presented nor does it indicate any support for or opposition to any candidate or political party;

(E) The sponsor may ask each candidate to provide biographical information such as education, employment positions, offices held, and community involvement and may impose a limitation on the number of words per submission;

(F) The voter guide is made available to the general public in the geographic area in which the sponsoring organization normally operates.

APPENDIX E

[Emblem]

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

February 14, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-28

James Bopp, Jr.
Brames, McCormick, Bopp & Abel
The Tudor House
191 Harding Avenue
P.O. Box 410
Terre Haute, Indiana 47808-0410

Dear Mr. Bopp:

This responds to your two letters dated October 24 and May 15, 1989, which request an advisory opinion on behalf of the Maine Right to Life Committee, Inc. ("MRLC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the financing of MRLC newsletters that contain candidate surveys.

Your letters, and the documents submitted with them, indicate that MRLC has previously published several newsletters for public distribution that present the views of Federal candidates, including their responses to MRLC surveys, on policy issues such as abortion. MRLC proposes to issue similar newsletters in the future; in particular, in May 1990 before the June 12 primary election in Maine. Your May 15 letter sets forth several "issues" on which you request an advisory opinion from the Commission.

These questions, in essence, present the more basic issue as to whether MRLC may use its general corporate treasury funds to finance the pre-election newsletters.

The factual basis of the request is presented in your letters and in other materials submitted by you. You explain that MRLC is a statewide, nonprofit, section 501(c)(4) membership organization incorporated in 1974 in the State of Maine. It was formed "to promote the sanctity of all human life, including unborn children, and to educate the public on issues relating to abortion, infanticide, and euthanasia." MRLC itself is "not associated with any political candidate, campaign committee, or political party," but in 1981 it established a separate segregated fund, the Maine State Right to Life Political Action Committee (MRLCPAC). This political committee makes contributions to candidates for federal and State elective offices who "take a prolife stand on the issues of abortion, infanticide, and euthanasia."

MRLC prepares and distributes a bimonthly newsletter, *Life for ME*, "containing educational articles and news of local chapter activities." Prior to elections, the newsletter includes the results of a survey of candidates for Federal and State office. The survey is taken by means of an MRLC questionnaire, and candidate responses to the survey indicate their positions on "prolife issues." Your May 15 letter states that funding for the newsletter comes from the general treasury of MRLC, and not from the treasury of MRLCPAC. MRLC's treasury includes corporate contributions.

Your request indicates that MRLC solicits donations from business entities and corporations, and it allows them to become "members." Donations are also regularly received by MRLC from businesses and

corporations.[1] In addition, during 1989, MRLC began soliciting business advertising from "pro-life businesses" to defray the costs of printing and mailing *Life for ME*.[2] These solicitations have been mailed to businesses who "have been . . . supporter[s] of MRLC in the past. . . ." MRLC has also invited inquiries from business entities that would be interested in larger ads.

With respect to the newsletter issues which carry candidate survey responses and other candidate viewpoints on MRLC policy positions, your request included copies of MRLC newsletters from May 1984 and November 1988. These issues include candidate responses to numerous MRLC questions concerning possible amendments to the U.S. Constitution such as the "Human Life Amendment," overturning the Supreme Court decision in *Roe* v. *Wade*, and an "abortion-neutralization" amendment to the Equal Rights Amendment. In addition, the surveys sought Federal candidates' responses that would indicate their support or opposition to federal legislation such as "human life bills," as well as "pro-life amendments" to appropriation bills prohibiting federal funding for abortions and the funding of organizations which make referrals for abortions. The 1988 candidate survey also presented other legislative pro-

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[1] MRLC records do not differentiate between corporate donations and those from other business entities. In 1985 and 1986, MRLC received respectively $87 and $175 from corporations or other businesses. These donations represented less than .5% of its total donations in 1985 and approximately 1% in 1986. In 1984, business donations to MRLC represented slightly over 5% of total donations.

[2] The cost for an ad of business card size is $25 per issue, or $100 to run the same ad for a year.

posals such as barring the denial of "beneficial medical treatment" for newborn infants and for handicapped, chronically ill, and elderly persons. Each of these questions was posed in a manner whereby a "yes" reply by the candidate would be readily recognized as the "pro-life response" favored by MRLC.

The 1984 survey questions and results were published in the May/June 1984 issue of the MRLC newsletter and included the names of seven Federal candidates. Each of them was recorded as making no response to the survey. The 1988 survey questions, along with the results, were published in the November 1988 newsletter and identified six Federal candidates. Four of them were recorded as making no response to the survey. One gave "yes" answers to all ten questions, and the sixth candidate gave "no" answers to two questions but did not respond to the others. An introduction to the published survey responses in both 1984 and 1988 briefly notes the forthcoming elections and states that the survey report "does not represent an endorsement" of any candidate by MRLC. The reader was advised to contact candidates who had not responded at all; the 1988 issue emphasized that it "is vital that your local candidate hear from you on this issue."

In addition to the survey results for Congressional candidates, the November 1988 newsletter includes a front page feature, with headlines and photos, covering the two major party presidential candidates in the 1988 general election and their vice-presidential running mates. The top headline in bold, large type states: **NOVEMBER ELECTION ISSUE 1988!** A lower headline in smaller bold type says: **Take-along Issue For Election Day!**

This front page feature has separate photos of George Bush and Michael Dukakis who are also identified by political party affiliation. In contrast to the Congressional candidates identified in the reported survey results, the presidential candidates did not receive an MRLC survey. Their views on abortion issues are reported with references to their past official records and publicly stated positions. In addition, their positions are conveyed by means of four brief quotations about them which are attributed to the National Right to Life Committee ("NRLC") and the National Abortion Rights Action League ("NARAL"). With respect to Mr. Bush, the opinion from NRLC is that he "has been a consistent supporter of pro-life efforts," while the NARAL view is that he "is anti-choice and supports President Reagan's opposition to abortion." For Mr. Dukakis, the NRLC assessment is: "This is the most pro-abortion presidential ticket in history." The NARAL opinion indicates that Mr. Dukakis "has been a consistent and strong supporter of reproductive rights for women."

Your request includes the above-described 1984 and 1988 MRLC newsletters and various other documents pertaining to the activities of MRLC including its sources of funding and its fund-raising solicitations. You indicate that MRLC proposes to continue publishing similar newsletters with costs paid from its general treasury funds, not by MRLCPAC. You explicitly state that MRLC expects to publish a voter guide survey issue in May 1990, just before the June primary election in Maine. You request an advisory opinion as to whether the Act and Commission regulations prohibit or permit this proposed activity.

The Act generally prohibits any corporaton from using its corporate treasury funds to make "a contribution or expenditure in connection with any [Federal] election." 2 U.S.C. § 441b(a). However, the Act does permit a corporation to use its corporate treasury funds to administer a separate segregated fund that will be used for political purposes. 2 U.S.C. § 441b(b)(2)(C). Such a fund is a political committee and, like other political committees, is subject to the Act's recordkeeping and reporting requirements. 2 U.S.C. § 431(4)(B); see generally 2 U.S.C. §§ 432-434.

In a 1986 decision, the United States Supreme Court held that the First Amendment precluded application of 2 U.S.C. § 441b to require a small, informally organized, incorporated advocacy group to finance its independent expenditures from a separate segregated fund. *FEC* v. *Massachusetts Citizens for Life* ("MCFL"), 479 U.S. 238 (1986). The holding in *MCFL* was explicitly limited to incorporated advocacy groups that satisfy a three part test, including the requirement that the corporation was not established by a business corporation and had a firm policy against accepting funds from business corporations. *Id.* at 263-264. Furthermore, in *MCFL*, the Court concluded that the administrative and financial burdens of establishing a separate segregated fund for election expenditures would impermissibly discourage some small, informal corporation from engaging in any political speech.

Your request indicates that MRLC has accepted funds from business corporations in the past. It also has a current policy of actively soliciting and accepting such funds whether in the form of donations or the purchase of advertising space in its bi-monthly

newsletter. For these reasons MRLC does not qualify for the limited exception from 2 U.S.C. § 441b carved out in the cited *MCFL* opinion. See Advisory Opinions 1988-22 and 1987-7. Accordingly, MRLC is subject to the prohibitions of 2 U.S.C. § 441b.[3]

Section 441b prohibits both contributions and expenditures in connection with any Federal election. 2 U.S.C. § 441b(a),(b)(2) and 11 CFR 114.2(b). Commission regulations provide, however, that expenditures by corporations for certain specific nonpartisan activities conducted in connection with Federal elections are not prohibited by the Act. 11 CFR 114.4(b), see 2 U.S.C. § 431(9)(B)(ii).

Given the factual context you present, the regulations most relevant here permit a corporation to prepare, and distribute to the general public, nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. 11 CFR 114.4(b)(5)(i). The regulations set out several factors for deciding whether a voter guide is

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[3] The United States Supreme Court heard oral argument on October 31, 1989, in an appeal from the United States Court of Appeals decision in *Michigan State Chamber of Commerce* v. *Austin*, 856 F.2d 783 (6th Cir. 1988), *appeal pending, sub nom.* No. 88-1569. The Sixth Circuit had decided that, based on *MCFL*, it was unconstitutional for a Michigan statute to prohibit the Michigan Chamber from using its general funds to buy a newspaper advertisement supporting a state candidate, even though more than 75% of the Chamber's treasury consisted of funds received from business corporation members. The Supreme Court's decision on this appeal could affect the conclusions of this advisory opinion. That effect, if any, may be determined through the submission by MRLC of a new advisory opinion request after the Court's opinion is rendered.

nonpartisan. 11 CFR 114.4(b)(5)(i)(A) through (F).

Corporations that qualify as tax exempt organizations under § 501(c)(3) or (c)(4) of the Internal Revenue Code, and that do not support, endorse or oppose candidates or political parties, need not comply with these factors in preparing and distributing their voter guide materials, but such materials may not favor one candidate or political party over another. 11 CFR 114.4(b)(5)(ii). The Commission has previously held that a tax exempt corporation becomes an organization that supports, endorses, or opposes candidates if it establishes a separate segregated fund. Such a corporation must therefore comply with the cited guidelines if it prepares voter guide materials. Advisory Opinion 1984-17. Because MRLC has established MRLCPAC as a separate segregated fund that contributes to candidates for Federal office, MRLC must follow the nonpartisan voter guide requirements.

The regulations set forth several factors that the Commission may consider in determining whether a voter guide is nonpartisan. 11 CFR 114.4(b)(5)(i)(A), (i)(B), (i)(C), (i)(D), (i)(E), and (i)(F). Factor (C) states, in pertinent part, that the wording of the questions does not suggest or favor any position on the issues covered. Factor (D) provides that the guide expresses no editorial opinion concerning the issues presented, nor indicates any support or opposition to any candidate. The 1984 MRLC voter guide conforms with these nonpartisan factors, but the 1988 voter guide does not.

The 1984 candidate survey questions were limited only to abortion and "right to life" issues. Two ques-

tions asked the respondent candidates whether, if elected, they would vote for ratification of two specific constitutional amendments the texts of which were set forth in the questions. Two additional questions asked whether the candidates would vote in favor of legislation "to restore protection for the lives of unborn children" and to impose "restrictions on the use of public funds for abortion." Although MRLC's favored policy positions on these issues are apparent from its name, the title of its newsletter and from other articles in the newsletter containing the voter guide, the survey questions in context with the rest of the newsletter are not so explicitly partisan as to convert an otherwise nonpartisan voter guide into one that improperly conveys election messages and candidate advocacy. Compare Advisory Opinion 1984-17 where the newsletter, in addition to a voter guide, also included a report of specific candidate endorsements made by another organization and urged readers to favor those candidates when voting in the forthcoming election. See also Advisory 1987-7. In the situation presented here, however, neither the other parts of the newsletter, the introduction to the survey results, nor the results themselves, instruct the reader as to what the MRLC-preferred candidate response should be. The report identifies seven Federal candidates by name and political party affiliation, but each name is followed with the letters NR. These letters are defined to mean "No response: candidate did not respond to survey questionnaire." On the page next preceding the candidate survey results, the newsletter includes the general suggestion that "if a candidate in your area is listed as 'no response,' you may want to contact him or her personally."

The foregoing pertinent characteristics of the 1984 MRLC voter guide indicate that it satisfies the nonpartisan factors set forth in Commission regulations at 11 CFR 114.4(b)(5)(i). As a result, MRLC expenditures for that guide, or for a 1990 MRLC voter guide which is materially indistinguishable from the 1984 voter guide, would not be prohibited corporate expenditures under 2 U.S.C. § 441b. See 2 U.S.C. § 437f(c)(1), see also Advisory Opinion 1984-17. By contrast and for the reasons discussed below, the 1988 general election voter guide submitted with your request does not satisfy the nonpartisan factors in Commission regulations, and expenditures by MRLC for that guide are prohibited by 2 U.S.C. § 441b.

The November 1988 "Election Issue" of the MRLC newsletter has a lower front page headline stating that Federal candidate surveys are enclosed. The front page also displays photos of both the Republican and Democrat presidential candidates along with several editorial opinions about their views on abortion. One opinion characterizes George Bush as "a consistent supporter of pro-life efforts," and another describes Michael Dukakis as a candidate on "the most pro-abortion presidential ticket in history." These presidential candidates were not, however, included in the candidate survey; they received no questions and provided no responses. See factors (A) and (B) in 11 CFR 114.4(b)(5)(i).

The candidate survey portion of the 1988 newsletter includes 10 questions prepared by the National Right to Life Committee only for Congressional candidates.[4] Four of these questions are posed in lan-

[4] The newsletter also included five separate questions that were sent to candidates for the Maine legislature as well as

guage explicitly indicating the favored "pro-life" response to the question. All questions are framed so that only a "yes" or "no" answer is expected. A bold-type message emphasizes: "PLEASE NOTE: A 'yes' response indicates agreement with the National Right to Life position on each question." [5] Six Federal candidates are listed, and four of them are designated as making no response to all ten survey questions. One candidate is designated as giving "yes" answers to all questions; another is shown as giving "no" answers to the first two questions and not answering the others.

The foregoing aspects of the 1988 voter guide are not in compliance with the nonpartisan factors set forth in Commission regulations at 11 CFR 114.4 (b)(5)(i). As discussed with respect to the 1984 voter guide, factors (C) and (D) provide that, to assure a voter guide's nonpartisan character, the questions should not be worded in a manner that favors any position on the issue presented. In addition, no editorial opinions concerning the issues, or in addition, no editorial opinions concerning the issues, or in support or opposition to any candidates, should be included.

The 1988 voter guide includes several questions that are posed with explicit unambiguous references

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the responses (or non-responses) of those candidates. This portion of the voter guide does not present any issues with respect to application of 2 U.S.C. § 441b and Commission regulations at 11 CFR Part 114.

[5] In addition, a note or "Key" explaining how to interpret the symbols used to present the response of each named candidate states that the letter "Y" signifies a "Yes response to question, pro-life response".

to MRLC's positions on "pro-life" or "right to life" issues. Other references in the guide make clear that "yes" responses conform to the "right to life" position, and the survey response format does not allow for a responding candidate to explain a disfavored "no" response, or a non-response to one or more of the questions. The presidential candidate features on the front page of the 1988 voter guide are replete with partisan editorial references to the candidates' positions on abortion, reproductive choice, Federal funding of abortions, and a "Human Life Amendment" to the Constitution. The report of the 1988 Congressional candidate survey results identifies one candidate who responded in full agreement with the "right to life" position and one who responded contrary to that position; four other named candidates made no responses to the survey questions.

Accordingly, if the 1990 MRLC voter guide contains partisan election messages similar to those discussed above with regard to the 1988 voter guide issue, it may not be lawfully financed with the general treasury funds of MRLC or any other corporation. Such expenditures could, however, be made by a separate segregated fund established by MRLC, pursuant to 2 U.S.C. § 441b(b)(2)(C) and (b)(4)(C), provided the fund is comprised of voluntary contributions lawfully solicited and accepted in accordance with the Act and Commission regulations. Because you proposed that MRLC use its general treasury funds for the 1990 voter guide, and not contributions made to a separate segregated fund, this opinion does not express or imply any conclusions as to whether or not MRLCPAC satisfies the requirements of the Act and Commission regulations for the

lawful solicitation of contributions to a separate segregated fund.

One of your questions asks whether the so-called "press exemption" in the Act would apply to MRLC and permit it to make payments from general treasury funds for public distribution of its voter guide newsletters without regard to the prohibitions of 2 U.S.C. § 441b. The Commission answers this question in the negative. The Commission has previously concluded that the news media exception, 2 U.S.C. § 431(9)(B)(i), applies to a press entity engaged in the normal press-business of covering and commenting on political campaigns and requires that the press entity derive revenues from the sale of subscriptions (or single issues) and advertising. Advisory Opinion 1980-109; see also Advisory Opinions 1987-8, 1982-58, and 1980-90. MRLC prints 10,000 copies of each newsletter issue, and approximately 4,700 of these are mailed. The rest are hand distributed. Its public distribution of the newsletter is without charge. In addition, while MRLC's specific corporate purposes include publication and distribution of articles on particular subjects from a "prolife" viewpoint, MRLC is essentially a nonprofit, tax exempt corporation with charitable, social, benevolent, and educational purposes. It is not engaged in the news media business, and is not the type of entity contemplated by Congress when it adopted the cited press exemption in 1974. See Advisory Opinion 1980-109; also see *MCFL*, 479 U.S. 238, at 250, 251.

Finally, the Commission recognizes that "issues" numbered I, II, and III in your May 15, 1989 letter pose questions that are predicated on whether or not the MRLC voter guides "constitute express advo-

cacy." This advisory opinion explains the extent to which your proposed activity is permitted or prohibited by the Act and regulations. It addresses only the issues necessarily raised by 2 U.S.C. § 441b and relevant Commission regulations at 11 CFR 114.4 (b)(5).[6] The Commission has not interpreted the Court's decision in *MCFL* as requiring the Commission in all circumstances to determine whether a given election message constitutes "express advocacy" in applying 2 U.S.C. § 441b to corporate expenditures made in connection with Federal elections.

This response constitutes an advisory opinion concerning application of the Act of regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. § 437f.

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[6] Your letter of May 15, 1989, sets forth five specific "issues" on which you ask the Commission to issue an advisory opinion based on the facts presented. The Commission notes that its advisory opinions are rendered with respect to application of the Act and Commission regulations to a specific and prospective activity or transaction proposed by the requesting person. 2 U.S.C. § 437f(a)(1), 11 CFR 112.1(a) and 112.1(b). The Commission has the discretion to identify for itself those legal issues which are raised by a given factual situation presented in an advisory opinion request, and it decides whether and how those issues should be addressed in the advisory opinion. While the Commission's formulation of the legal issues presented may frequently correspond with those expressly posed by a requester, that is neither required, nor always the case.

Sincerely,

/s/ Lee Ann Elliott
LEE ANN ELLIOTT
Chairman for the
Federal Election Commission

Enclosures (AOs 1988-22, 1987-8, 1987-7, 1984-17, 1982-58, 1980-109, and 1980-90)

P.S. Chairman Elliott and Commissioner Aikens voted to approve this opinion and will file concurring opinions at a later date.

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